PP

v.

TAN TATT EEK

FEDERAL COURT, PUTRAJAYA
SITI NORMA YAAKOB CJ (MALAYA)
STEVE SHIM CJ (SABAH & SARAWAK)
NIK HASHIM FCJ
[CRIMINAL APPEAL NO: 05-40-2002 (W)]
18 OCTOBER 2005

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Whether there was an express affirmative finding of possession - Whether presumption of possession and knowledge under s. 37(d) could be relied on to presume that accused was trafficking in dangerous drugs under s. 37(da)(iiia) - Whether conviction for trafficking under s. 39B unsupportable and ought to be substituted with a conviction for possession under s. 12(2)*

The respondent was charged with trafficking in dangerous drugs (74.9 grams of a mixture of heroin and monoacetylmorphines), an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s. 39B(2) of the Act. The learned High Court judge found the respondent guilty as charged and sentenced him to death. On appeal against the conviction and sentence, the Court of Appeal allowed the appeal and reduced the charge to one of possession under s. 12(2) punishable under s. 39A(2)(d) of the Act, and substituted the sentence to 15 years imprisonment to run from the respondent's date of arrest on 11 August 1997 together with a minimum whipping of 10 strokes. Dissatisfied with the reduction of the charge, the Public Prosecutor appealed to this court. The facts of the case show that the police had arrested the respondent while he was in possession of a plastic bag, which upon examination, revealed two packages containing the relevant drugs. The learned trial judge found that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case whereas the Court of Appeal held that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the plastic bag. Hence, the main issue in this case was whether, on the facts, the respondent had knowledge of the drugs in the plastic bag.

Held (dismissing the appeal):
Per Nik Hashim FCJ

[1] In the present case, the learned trial judge found that the plastic bag was held in the respondent's hand and that the respondent had physical custody and control of the plastic bag. There was no express affirmative finding of possession as understood in criminal law by the learned trial judge and in the absence of such finding, the learned judge ought not to have called the respondent to make his defence on the charge of trafficking. On the facts, the grounds on which the learned trial judge relied to find the respondent guilty of trafficking were completely untenable and unsustainable, and could not withstand scrutiny. At most, the prosecution had only proved custody and control of the plastic bag and the packages of the impure drugs. Under s. 37(d) of the Act, the presumption could have been invoked for possession and knowledge of the nature of the dangerous drugs in the plastic bag, and consequently, the respondent ought to have been called to enter his defence on a charge of possession under s. 12(2) of the Act. On the authority of *Muhammed Hassan v. PP*, the prosecution, however, could not rely on the presumption of possession and knowledge under s. 37(d) to presume that the respondent was trafficking in dangerous drugs under s. 37(da)(iiia) of the Act. In the circumstances of the instant case, the conviction for trafficking under s. 39B of the Act was unsupportable and the Court of Appeal was, therefore, right to substitute it with a conviction for possession in contravention of s. 12(2) and punishable under s. 39A(2) of the Act. (p 468 d-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden dituduh kerana mengedar dadah berbahaya (campuran 74.9 gram heroin dan monoacetylmorphines), suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') yang boleh dihukum di bawah s. 39B(2) Akta. Yang arif hakim Mahkamah Tinggi mendapati responden bersalah seperti dituduh dan menjatuhkan hukuman mati ke atasnya. Semasa rayuan terhadap sabitan dan hukuman, Mahkamah Rayuan membenarkan rayuan dan meringankan pertuduhan kepada pertuduhan memiliki di bawah s. 12(2) Akta yang boleh dihukum di bawah s. 39A(2)(d) Akta, dan menggantikan hukuman kepada 15 tahun penjara berkuatkuasa dari tarikh responden ditangkap pada 11 Ogos 1997 beserta dengan sebatan minima 10 rotan. Tidak berpuas hati dengan peringanan pertuduhan, Pendakwa Raya merayu ke mahkamah ini. Fakta kes menunjukkan bahawa responden ditangkap oleh polis semasa memiliki satu beg plastik yang, selepas pemeriksaan, didapati mengandungi dua bungkusan yang mengandungi dadah terbabit. Yang arif hakim mendapati responden mempunyai pengetahuan tentang dadah melalui inferens serta halkeadaan kes, sementara Mahkamah Rayuan merumuskan bahawa tidak ada asas fakta dikemukakan oleh

pendakwaan bagi membolehkan inferens dibuat bahawa responden mengetahui sifat dadah yang terkandung di dalam beg plastik. Oleh hal yang demikian, isu utama di dalam kes ini adalah sama ada, berdasarkan fakta, responden mempunyai pengetahuan mengenai dadah di dalam beg plastik tersebut.

Diputuskan (menolak rayuan)
Oleh Nik Hashim HMP:

[1] Dalam kes ini, yang arif hakim mendapati bahawa beg plastik dipegang oleh responden ditangannya dan bahawa responden mempunyai jagaan dan kawalan fizikal beg tersebut. Yang arif hakim tidak membuat apa-apa dapatan afirmatif milikan sepertimana ianya difahami di dalam undang-undang jenayah, dan dalam ketiadaan dapatan sedemikian, yang arif hakim tidak seharusnya memanggil responden untuk membela diri atas pertuduhan mengedar. Berdasarkan fakta, alasan di atas mana yang arif hakim bergantung untuk mendapati responden bersalah kerana mengedar jelas tidak boleh dipertahankan, dan tidak mampu melulusi ujian. Paling tinggi, pendakwaan hanya membuktikan jagaan dan kawalan beg plastik dan bungkusan dadah berbahaya tersebut. Di bawah s. 37(d) Akta, anggapan boleh dibangkitkan bagi milikan dan pengetahuan sifat dadah berbahaya di dalam beg plastik, dan oleh kerana itu, responden harus dipanggil untuk membela diri atas pertuduhan milikan di bawah s. 12(2) Akta. Bagaimanapun, atas autoriti *Mohammed Hassan v. PP*, pendakwaan tidak boleh bergantung kepada anggapan milikan dan pengetahuan di bawah s. 37(d) untuk mengandaikan bahawa responden telah mengedar dadah berbahaya di bawah s. 37(da)(iiia) Akta. Oleh yang demikian, Mahkamah Rayuan betul apabila mengganti sabitan kepada sabitan kerana milikan di bawah s. 12(2) yang boleh dihukum di bawah s. 39A(2) Akta.

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(foll)***
Ong Ah Chuan v. PP [1981] 1 MLJ 64 ***(dist)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 CA ***(refd)***
Tai Chai Keh v. PP [1948-49] MLJ Supp 105 ***(refd)***
Tan Ah Tee & Anor v. PP [1980] 1 MLJ 49 ***(dist)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), (da), 39A(2)(d), 39B(1)(a), (2)

Misuse of Drugs Act 1973 [Sing], ss. 3(a), 16

For the appellant/PP - Mohd Yusof Zainal Abiden, Senior DPP
For the respondent - Gurbachan Singh; M/s Bachan & Kartar

[Appeal from Court of Appeal; Criminal Appeal No: W-05-73-99]

Reported by Suresh Nathan

JUDGMENT

Nik Hashim FCJ:

The respondent was charged for trafficking in dangerous drugs weighing 74.9 grammes of a mixture of heroin and monoacetylmorphines, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the Act") punishable under s. 39B(2) of the Act. He was found guilty by the learned High Court Judge (Abdul Wahab bin Patail, J) and was sentenced to death. On appeal against the conviction and sentence the Court of Appeal (Mokhtar bin Hj Sidin, Denis Ong Jiew Fook and KC Vohrah JJCA) allowed the appeal and reduced the charge to possession under s. 12(2) of the Act punishable under s. 39A(2)(d) of the Act and substituted the sentence to 15 years imprisonment to run from the respondent's date of arrest on 11 August 1997 and with minimum whipping of ten strokes. Dissatisfied with the reduction of the charge, the Public Prosecutor has now appealed to this court.

The facts of the case are that on 11 August 1997 at about 8.30pm Insp. Shaiful (SP2) together with a team of police personnel, acting on information, had taken position around the parking area at Campagna Condominium, Meadow Park 2 Jalan 1/130, Happy Garden Kuala Lumpur. At about 9pm they saw a Kancil car with registration number WFC 4906 driven by the respondent with a woman passenger entering the car park. The respondent got out of the car and carried in his right hand an orange plastic bag and entered a lift. Five minutes later, the respondent came out of the lift and proceeded to the car carrying the orange bag. As he was about to open the door of the car, PW2 and his team rushed towards the respondent and identified themselves. The respondent dropped the plastic bag and he was arrested. His woman companion, Choy Mee Fong (SP3) was detained but was subsequently released.

The plastic bag was examined and in it was found two packages wrapped in newspaper. Each package had a clear plastic wrapping containing a granular and powdery substance. The substance in both packages on analysis by a Government Chemist (SP6) was found to contain a mixture of heroin (18.4 grammes) and monoacetylmorphines (56.5 grammes), dangerous drugs within the meaning of the Act.

In his judgment, the learned trial judge, amongst other things, said:

> The dangerous drugs heroin and monoacetylmorphines were in a sealed clear plastic bag wrapped simply in newspaper and placed in the bag. The bag was neither sealed nor tied up. The bag is a thin plastic bag. One cannot not know there were paper wrapped packages in the bag. The paper wrapped packages themselves are not sealed. Inside each paper wrapper is a sealed clear plastic bag containing the pink granular and powdery substance. The bag was not tied and sealed in such manner that a carrier cannot know what is really inside. Clearly

> the bag is not packaged in such a manner as to be carried by a person who is being denied knowledge of its contents, and would be in the case of an innocent carrier. In the absence of any evidence to the contrary, the manner of packaging in this case would in the common course of human conduct mean that the carrier knows of the contents. The Court concludes he knew of the thing or substance he was carrying in the bag.
>
> The conclusion that he knew that what he was carrying was a pink granular and powdery substance in a sealed clear plastic bag wrapped in newspaper does not necessarily mean that he knew the nature of the substance as a dangerous drug…
>
> The accused certainly does not appear to be of below average intelligence. The fact it was packaged in such nonchalant manner only serves to show that the accused knows the nature of it and either wrapped it and put it in the bag himself to carry it or he is a trusted carrier. There is also no evidence he is an addict or consumer which might go some way to explain if he was carrying it for a purpose other than to traffic. Its quantity of nearly one and a half kilos of the pink granular and powdery substance adds further to the inference of trafficking: *Ong Ah Chuan v. PP* [1981] 1 MLJ 64. It is not a small amount. Indeed the total quantity well exceeds the amount of 15 grammes content of dangerous drugs that the Act itself employs for the presumption of trafficking.
>
> Certainly the evidence before the Court is sufficient for the inference to be reasonably drawn in the ordinary and common course of events and human conduct that he knew the nature of what he was carrying, that he was carrying it in the course of trafficking …

In his defence the respondent chose to make an unsworn statement from the dock. His defence was that he went to the premises in order to return the plastic bag to Ah Seng who had left it inside the respondent's car during a night out the previous day.

The learned trial judge however, did not find favour with the defence and accordingly found the respondent guilty as charged and sentenced him to death.

On appeal, the Court of Appeal reduced the charge to one of possession under s. 12(2) of the Act and the respondent was sentenced accordingly. In delivering the judgment of the court, KC Vohrah JCA said:

> Here there was no factual matrix on which the trial Judge could have inferred that the Accused had knowledge of the nature of the dangerous drugs. All that was proved was that he had control and custody of the bag and the packages of the impure drugs and under s. 37(d) the presumption could have been invoked for knowledge of the nature of the drugs. And bearing in mind the Federal Court case of *Muhammed bin Hassan v. PP* [1998] 2 MLJ 273 the prosecution cannot and in this case the trial Judge could not have relied on the presumption under 37(d) to presume that the Accused was trafficking in the dangerous drugs under s. 37(da)(iiia).

At the close of the prosecution case the learned trial Judge had relied on actual custody and control of the drugs in the Accused and his knowledge of the nature of the dangerous drugs without resort to the presumption of s. 37(d) for possession of the drugs in the Accused. And we have said there was no factual matrix for him to make the inference of such knowledge. He then invoked the presumption under s. 37(da) on the basis of proved possession and we say that no knowledge in the drugs having been proved there was no possession proved and the invoking of the presumption under s. 37(da) was misconceived.

The learned trial Judge could only have called upon the Accused to rebut the presumption of possession under s. 37(d). The Accused made a unsworn statement that he was returning the bag to one "Ah Seng" who had left the bag in his car during a night out the previous day. Ah Seng had telephoned him to bring the bag to his apartment. He went to the 6th floor using the lift and did not find anyone there and he had returned to the car to use his mobile telephone to give Ah Seng a call when he was arrested. We had no hesitation on the evidence in the case and his defence to come to the conclusion that he had not rebutted on a balance of probabilities that he had possession of the dangerous drugs as charged. We set aside the conviction on the trafficking charge and substituted a conviction on a charge of possession of the dangerous drugs under s. 12(2) of the Act punishable under s. 39A(1)(d) of the Act and sentenced him to 15 years of imprisonment from the date of arrest and 10 strokes of the rattan.

The main issue in this case is whether on the facts the respondent had knowledge of the drugs in the plastic bag.

In our view, the Court of Appeal was right in holding that there was no factual matrix adduced by the prosecution to infer that the respondent had knowledge of the nature of the drugs in the bag. On the evidence, the learned trial judge erred in finding that the respondent had knowledge of the drugs by way of inferences and from the circumstances of the case.

In this case, the respondent was seen and found to be carrying the orange plastic bag in his right hand and having dropped the bag he reacted with shock when he was arrested by the police. The learned trial judge held that the respondent had physical custody and control of the bag, and we see that he was right in coming to that conclusion. However, he went further to find by inference from the respondent's conduct and appearance that the respondent had knowledge of the drugs in the bag. To our minds, such a finding was not justified on the evidence before him.

The factum of the respondent having dropped the bag and displayed reaction of shock can be facts upon which the prosecution can invite the trial court to infer guilt on part of the respondent over the presence of the drugs in the bag. But such conduct is equally consistent with an innocent man who is in a state of pure panic reacts in that way (see *Abdullah Zawawi bin Yusoff v. Public Prosecutor* [1993] 4 CLJ 1). On the conduct of the respondent, the learned trial judge at p. 133 of the appeal record jilid II had this to say:

> The accused was clearly caught by surprise. To my mind the reaction of shock and the dropping of the bag exhibited by a person caught by surprise does not unequivocally show guilt. It could equally be the reaction of an innocent but surprised person. No firm inference can be drawn on the basis of such insufficient evident.

So, how much support do the facts of dropping and being in a state of shock lend the appellant in his submission that the court should infer from them the fact that the respondent had knowledge of the drugs? In *Tai Chai Keh v. Public Prosecutor* [1948-49] MLJ Supp 105 at p. 108 Spenser Wilkinson J said:

> … where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of opinion that the inference most favourable to the accused should be adopted.

Thus, it is clear from the above said passage that what is required is that in order for the prosecution to ask the court to draw any inference, it must provide the court with clear evidence of a set of facts which leave no other possible alternative inference which can reasonably be drawn. In the absence of such evidence, the court cannot but hold that there are other inferences possible in the circumstances. Hence, the facts of 'dropping and being in a state of shock' without more cannot constitute knowledge of the contents of the bag. There is simply insufficient evidence to support the inference of knowledge in the present case.

Furthermore, the evidence was that the drugs were in newspaper wrapped packages, and surely, one would not be able to see through the newspaper wrapping. One wonders how the manner of packaging in this case would in the ordinary course of conduct mean that the carrier knows of the contents of the bag. It is rather unfortunate that the learned trial judge indulged in conjecture and speculation to make inferences of knowledge in this case.

The learned trial judge relied on the Singapore case of *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64 (which went up on appeal to the Privy Council) with regard to the large quantity of drugs 74.9 grammes of a mixture of heroin and monoacetylmorphines found to infer trafficking in the present case. Unlike the present case, the accused in that case admitted to the dangerous drug found in his possession but had said it was for his own consumption and the defence was rejected by the courts. The accused in that case was found guilty of trafficking and sentenced to death. His appeal against conviction was dismissed. Clearly, therefore, *Ong Ah Chuan* is not applicable to the present case.

Before us, the learned Senior Deputy Public Prosecutor drew our attention to another Singapore case of *Tan Ah Tee & Anor v. Public Prosecutor* [1980] 1 MLJ 49 to show similarities to our present case and based on that authority, he submitted that the respondent should be found guilty of trafficking. In that case, T and L were charged jointly for trafficking in 459.3 grammes of diamorphine, an offence under s. 3(a) of the Misuse of Drugs Act 1973. The facts showed that on 3 September 1976 two narcotic officers observed the appellants emerging from Block A of Far East Mansions, Kim Yam Road, Singapore and walking towards a parked car. T was carrying a plastic bag. On reaching the car T handed the bag to L and unlocked the car door. They then drove to Dickson Road followed by the officers. At Dickson Road, L alighted from the car carrying the bag. One of the officers identified himself and asked her what was in the bag. L looked stunned and dropped the bag. The officer seized the bag and after a violent struggle arrested her. T was also arrested. Both denied knowledge of the contents of the bag. They were found guilty and sentenced to death. Their appeals against conviction were dismissed.

The facts in *Tan Ah Tee* are not quite similar to our case. There, T in his cautioned statement had admitted to the dangerous drug found in the bag while against L, she was found to be in possession of the controlled drug by virtue of presumption of possession under s. 16 of the Misuse of Drugs Act 1973. Unlike that case, the prosecution in our case did not rely on the statutory presumption of possession and knowledge under s. 37(d) of the Act but relied on inferences and from the circumstances of the case to prove actual possession and trafficking. Thus, *Tan Ah Tee* is readily distinguishable not only on the facts but also on the law applicable. For that reason, we consider the decision in *Tan Ah Tee* is not relevant to our case.

The facts of our case are somewhat similar to *Muhammed bin Hassan v. Public Prosecutor* [1998] 2 CLJ 170. In fact the learned Deputy Public Prosecutor in the court below so stated in his submission at pp. 88 and 89 of the appeal record jilid II. The facts in Muhammed bin Hassan are that acting on information received on 31 October 1990 at 7 pm, DPC Hairuman bin Ihsan (PW5) together with DPC Haron bin Pandak (PW6) and one DPC Sharif went to a squatter area in Kampong Bakar Satu, Jalan Kubur Johor Bahru. Upon arrival at 7.45pm, the police party entered a lane between some houses, where they met the appellant carrying a package in his right hand. PW5 identified himself as a police officer. This prompted the appellant to take flight and in so doing, dropped the package which he carried. An examination of the package revealed that it contained two packages of cannabis. The appellant was convicted in the High Court on a charge of drug trafficking under s. 39B(1)(a) of the Act and sentenced to death. On appeal the Federal Court

allowed the appeal, quashed the conviction and substituted the death sentence with 16 years imprisonment and 10 strokes of whipping. The Federal Court's decision which is relevant to the present case is that in order to invoke the presumption of trafficking under s. 37(da) of the Act, there must be an express affirmative finding of possession as understood in criminal law, and not a legal presumption of possession and knowledge as provided for under s. 37(d). The presumption of possession and knowledge under section 37(d) cannot be used to invoke the presumption of trafficking under s. 37(da) of the Act. That decision was reaffirmed by the Federal Court (Ahmad Fairuz, CJ, Abdul Malek Ahmad, PCA, Haidar, CJ (Malaya), Steve Shim, CJ (Sabah & Sarawak), Siti Norma Yaakob, FCJ (as she then was) PS Gill, FCJ and Augustine Paul, JCA (dissenting on the application of double presumptions)) in *Public Prosecutor v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713 by holding that the principle in *Muhammed bin Hassan* that the presumption under s. 37(d) may not form the evidentiary basis to raise the presumption of trafficking under s. 37(da) was thorough and rational and did not warrant interference.

In the present case, the learned trial judge found that the bag was held in the respondent's hand and that the respondent had physical custody and control of the bag. There was no express affirmative finding of possession as understood in criminal law by the learned trial judge. In the absence of such finding, the learned trial judge ought not to have called the respondent to make his defence on the charge of trafficking. In our view, the grounds on which the learned trial judge relied to find the respondent guilty of trafficking were completely untenable and unsustainable and could not withstand scrutiny. At most, the prosecution had only proved custody and control of the bag and the packages of the impure drugs, and under s. 37(d), the presumption could have been invoked for possession and knowledge of the nature of the dangerous drugs in the bag and consequently, the respondent to be called to enter his defence on a charge of possession under s. 12(2) of the Act. On the authority of *Muhammed bin Hassan*, the prosecution, however, cannot rely on the presumption of possession and knowledge under s. 37(d) to presume that the respondent was trafficking in the dangerous drugs under s. 37(da)(iiia) of the Act.

In the circumstances of the present case, it is our view that the conviction for trafficking under s. 39B of the Act was unsupportable and the Court of Appeal was therefore right to substitute a conviction for possession in contravention of s. 12(2) and punishable under s. 39A(2) of the Act.

In the event, the appeal is dismissed. The conviction and sentence on the reduced charge by the Court of Appeal are hereby affirmed.